

NTSB Order No. EA-4178

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of May, 1994

Respondent .

OPINION AND ORDER

6351

for failure to appear for reexamination.² We deny the appeal.

The basis for the reexamination order, as stated in the Administrator's complaint, was information that respondent had failed a bi-annual flight review (BFR) in April 1992 and that he had difficulty reading. At the hearing, counsel for the Administrator framed the question in terms of respondent's ability to read and understand english sufficiently to act as a commercial pilot. The Administrator's allegations were supported by two individuals, Ms. Michelle Farris and Mr. Charles McClure, both of whom had had unsatisfactory business dealings with respondent. Mr. McClure, a mechanic/flight instructor who had worked for respondent (apparently without pay, awaiting the financial arrangements to be worked out), testified that he was asked by respondent to administer a BFR. Respondent, he testified, could not read the written test and was not able to answer correctly even the first few of the easier questions when they were read to him.³

At the hearing, respondent admitted his reading difficulties,⁴ but argued that his slowness in reading and understanding did not hamper his flight performance and that he

²Respondent waived the deadlines applicable to emergency orders.

³The other witness, Michelle Farris, had paid respondent's company to give her flight instruction, and she later loaned respondent additional funds. Mr. McClure provided that flight instruction. Ms. Farris did not receive all the instruction for which she had paid, and she obtained one of respondent's helicopters for his failure to repay the loan.

⁴He believes he had dyslexia. Tr. at 277.

had neither sought nor taken an April 1992 BFR. He stated that he had no need to do so because he had taken and passed a BFR in January of that same year. This testimony was supported by that of a flight instructor who testified that he administered, and respondent successfully completed, a BFR on January 6, 1992. This witness (and others, albeit respondent's relative and friend) also testified to seeing no special problem with respondent's reading.

The law judge tested respondent's reading ability and concluded (Tr. at 296):

I am persuaded that [respondent] has no real problem reading, speaking and understanding the English language, as required in Section 61.123 of the FARs.

Having observed the demeanor of the witnesses and weighing the totality of the evidence, I find myself unable to give any credence to the testimony of the flight instructor and his girlfriend.⁵ Stated differently, I am compelled to conclude that the instructor lied when he said that he attempted to give Respondent a BFR on April 1992.

Accordingly, the law judge found that the grounds underlying the Administrator's reexamination order were not reasonable, and dismissed the order.

On appeal, the Administrator raises only one issue. He argues that, as a matter of law, the order must be affirmed if at the time it was issued the Administrator had reasonable grounds to question respondent's competence. Although the Administrator argues that, at the hearing, the issues became confused, we think

⁵The law judge later removed any reference to the relationship between Ms. Farris and Mr. McClure. Tr. at 299.

the Administrator misreads the law.

As we said in Administrator v. Norris, NTSB Order EA-3687 (1992) at 4:

[W]e have held that, where the Administrator has reasonable grounds for requiring a reexamination, and the airman does not submit to one, the Administrator may suspend the airman certificate until proficiency is demonstrated. See, e.g., Administrator v. Phillips, 1 NTSB 615, 616 (1969), and Administrator v. Harrington, 1 NTSB 1042, 1043 (1971).

The evidence must raise a reasonable question about respondent's qualification. Norris at 6.

In this case, the FAA inspector may well have had reasonable grounds at the time the order was issued to call for a reexamination, based only on the information gained from Mr. McClure and Ms. Farris. However, the Administrator's argument would have us ignore the results of the hearing, and proceed as if it had not occurred. It seems axiomatic to us that, if the information on which the reexamination order is based is found, at the hearing on the merits of the reexamination order, not to be reasonable, it may no longer be used as the basis for a reexamination demand.⁶ Here, the law judge found that the

⁶In Norris, we also quoted Administrator v. Ringer, 3 NTSB 3948, 3949 (1981) for the proposition that, to have his order upheld, the Administrator must demonstrate a reasonable basis for believing that pilot competence could have been a factor in a pilot's performance. The evidence -- the evidence at the hearing, that is -- must raise a reasonable question about respondent's performance. In this case, what may have been the inspector's earlier reasonable belief was found by the law judge not actually to be reasonable. Once the question comes to a hearing, it becomes a question of objective fact, not relative belief.

information on which the FAA had relied was not trustworthy and the Administrator does not contest that finding.⁷

ACCORDINGLY, IT IS ORDERED THAT:

1. The appeal is denied; and
2. The initial decision is affirmed.

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁷To the extent the Administrator argues that many of the law judge's findings are irrelevant, we disagree. His findings were either directly relevant to the allegations in the Administrator's order or related to testimony introduced for impeachment purposes.